FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 21 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 508.

SCRIPPS-HOWARD RADIO, INC.,

v.

FEDERAL COMMUNICATIONS COMMISSION.

On Certificate from the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE APPELLANT.

PAUL M. SEGAL,
HARRY P. WARNER,
1026 Woodward Building,
Washington, D. C.,
Attorneys for the Appellant.

GEORGE S. SMITH,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

	Page
Opinion Below	1
Jurisdiction	2
Statement of the Case	2
Question Presented	3
Summary of Argument	3
Argument	4
I. The power to issue a stay order *pendente lite* is a concomitant of the Court's power to reverse decisions of the Commission and compel obedience to the reversal, as specified in Section 402(e)	4
II. The legislative history of Section 402(b) indicates an intention that the Court of Appeals may enter stay orders	6
(a) It had been the practice to issue such orders under an identical statute at the time 402(b) was enacted and this had been reported to Congress	6
(b) The effort to prevent the issuance of such orders had been made and had failed and this was reported to Congress	7
(c) The provision for stay orders in Section 402(a) and the omission of specific provision in 402(b) is not indicative of an intention to prevent stay orders in radio cases; it is merely evidence of the conglomerate character of the statute	9
(d) The failure of Congress to reenact H. R. 7716 after the pocket veto is not indicative of an intention to prevent stay orders	10
i) The failure to reenact the statute is equivocal	10

Page

ii) H. R. 7716 must be considered against the background of *General Broadcasting System* v. *Bridgeport Broadcasting Station* which shows the real reason for H. R. 7716 was a desire to provide for hearing and bond, not a desire to create authority for stay orders 11

III. The decision of this Court in the Pottsville case does not abolish the analogy of appellate-to-inferior court relationship, the decision merely cuts down the analogy to its proper proportion; it does not operate to deprive the appellate court of what is essentially an appellate jurisdiction; it leaves the Court with all statutory power to issue all necessary remedial writs in aid of its appellate jurisdiction, including the power to stay a decision of the Commission..... 14

IV. Even if the appellate court analogy be entirely destroyed, the appeal to the Court of Appeals from a decision of the Federal Communications Commission must be regarded as an original suit in equity with all power in the court to issue interlocutory decrees for the protection of the appellant's property 16

V. In general, in dealing with appellate stay of administrative orders, Congress has not specifically provided for such stays but has relied on the general power of the Courts to authorize stays; mostly, legislative reference to stay orders has assumed the Courts' power and has gone on to restrict its exercise..... 18

Conclusion 19

Acknowledgment of Service 20

Appendix 21

Page

TABLE OF CITATIONS.

Bridgeport Broadcasting Station, Inc. v. Federal Radio Commission, 53 F. (2d) 664 12
Crosley Corporation v. Federal Communications Commission, 70 App. D. C. 312, 106 F. (2d) 833..... 8
Fly v. Heitmeyer, 309 U. S. 146 6
Federal Communications Commission v. Pottsville Broadcasting Company, 309 U. S. 134, 145..... 5-6
Federal Communications Commission v. Sanders Brothers Broadcasting Station, 70 App. D. C. 297. 6
Federal Radio Commission v. General Electric Company, 281 U. S. 464 .....6, 7, 8
Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U. S. 266.....6, 17
Federal Trade Commission v. Klesner, 274 U. S. 145, 150-158 14
General Broadcasting System, Inc. v. Federal Radio Commission, 60 App. D. C. 64 12
General Broadcasting System, Inc. v. Bridgeport Broadcasting Station, Inc., 53 F. (2d) 664 12
Heald v. District of Columbia, 254 U. S. 20, 22-23.... 6
Helvering v. Wilshire Oil Company, 308 U. S. 90, 99.. 6
Journal Company v. Federal Radio Commission, 60 App. D. C. 92 17
Omaha & Council Bluffs Street Railway Company v. Interstate Commerce Commission, 222 U. S. 582.. 15
Trinity Methodist Church South v. Federal Radio Commission, (Certiorari denied, 284 U. S. 685)..... 6
United States v. Morgan, 307 U. S. 183, 191 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 508.

SCRIPPS-HOWARD RADIO, INC.,

v.

FEDERAL COMMUNICATIONS COMMISSION.

On Certificate from the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE APPELLANT.

OPINION BELOW.

This case being here on certificate prior to ruling by the lower court, there is no opinion. The case is before the United States Court of Appeals for the District of Columbia on the appellant's petition that the Court order a stay of the effectiveness of the contested action of the Federal Communications Commission. The matter was argued before Associate Justices Stephens, Miller and Rutledge.

February 3, 1941, two opinions were entered, the majority opinion by Justice Miller, concurred in by Justice Rutledge, holding that the Court of Appeals does not have power to grant the relief requested, and the minority opinion by Justice Stephens, holding that the Court does have such power. These opinions are printed at R. 4-48.

The appellant petitioned for rehearing of the matter before the six members of the Court *en banc*. This petition was granted, which is tantamount to setting aside the opinion of the panel of three judges. After briefs and reargument before the full Court, the judges were equally divided and the question of the Court's power was certified.

JURISDICTION.

Certificate from the United States Court of Appeals for the District of Columbia is provided for by Section 239 of the Judicial Code, 28 U. S. C. 346.

STATEMENT OF THE CASE.

Appellant is licensee of a radiobroadcasting station. The Federal Communications Commission granted authority to another station in another city to operate at appellant's frequency. This action was taken without notice to or hearing accorded the appellant. Appellant, pursuant to Section 405 of the Communications Act of 1934 and Section 1.271 of the Rules and Regulations of the Commission (reprinted in the appendix), filed its petition under oath for hearing or rehearing. The petition was denied. The appellant then appealed to the United States Court of Appeals for the District of Columbia, pursuant to Section 402(b) (2) of the Communications Act, setting up that it was a person aggrieved and whose interests were adversely affected by the action of the Commission in that such action, taken as it was without notice or hearing and upon denial of a requested hearing, would result in destructive electrical interference bringing about substantial reduction of appellant's service area contrary to the public interest, convenience

and necessity in violation of the Commission's regulations, the Communications Act and the due process clause of the Fifth Amendment.

QUESTION PRESENTED.

"Where, pursuant to the provisions of Section 402(b) of the Communications Act of 1934, an appeal has been taken, to the United States Court of Appeals, from an order of the Federal Communications Commission, does the court, in order to preserve the status quo pending appeal, have power to stay the execution of the Commission's order from which the appeal was taken, pending the determination of the appeal?"

SUMMARY OF ARGUMENT.

I. The power to issue a stay order *pendente lite* is a concomitant of the Court's power to reverse decisions of the Commission and compel obedience to the reversal, as specified in Section 402(e).

II. The legislative history of Section 402(b) indicates an intention that the Court of Appeals may enter stay orders.

(a) It had been the practice to issue such orders under an identical statute at the time 402(b) was enacted and this had been reported to Congress.

(b) The effort to prevent the issuance of such orders had been made and had failed and this was reported to Congress.

(c) The provision for stay orders in Section 402(a) and the omission of specific provision in 402(b) is not indicative of an intention to prevent stay orders in radio cases; it is merely evidence of the conglomerate character of the statute.

(d) The failure of Congress to reenact H. R. 7716 after the pocket veto is not indicative of an intention to prevent stay orders.

(i) The failure to reenact the statute is equivocal.

(ii) H. R. 7716 must be considered against the background of *General Broadcasting System* v.

Bridgeport Broadcasting Station which shows the real reason for H. R. 7716 was a desire to provide for hearing and bond, not a desire to create authority for stay orders.

III. The decision of this Court in the Pottsville case does not abolish the analogy of appellate-to-inferior-court relationship, the decision merely cuts down the analogy to its proper proportion; it does not operate to deprive the appellate court of what is essentially an appellate jurisdiction; it leaves the Court with all statutory power to issue all necessary remedial writs in aid of its appellate jurisdiction, including the power to stay a decision of the Commission.

IV. Even if the appellate court analogy be entirely destroyed, the appeal to the Court of Appeals from a decision of the Federal Communications Commission must be regarded as an original suit in equity with all power in the court to issue interlocutory decrees for the protection of the appellant's property.

V. In general, in dealing with appellate stay of administrative orders, Congress has not specifically provided for such stays but has relied on the general power of the Courts to authorize stays; mostly, legislative reference to stay orders has assumed the Courts' power and has gone on to restrict its exercise.

ARGUMENT.

I. The power to issue a stay order pendente lite is a concomitant of the Court's power to reverse decisions of the Commission and compel obedience to the reversal, as specified in Section 402(e).

Section 402(e) of the Communications Act of 1934, outlining procedure on appeal to the Court of Appeals from decisions of the Commission, provides that after hearing the appeal, the court is to have power to enter a judgment affirming or reversing the decision of the Commission. It goes on to provide "... in event the court shall render a decision and enter an order reversing the decision of the Commission, it

shall remand the case to the Commission to carry out the judgment of the court. . . . The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States. . .".

In the present case the notice of appeal alleges that both public and private interests are adversely affected by the Commission's decision without any hearing accorded the appellant and that if afforded an opportunity to make proof, the appellant could show that the action of the Commission would result in severe electrical interference and that the action of the Commission is contrary to the public interest for reasons specified (R. 21).

When the present appeal comes on for final hearing the Court will affirm or reverse the Commission's decision. If the Commission's decision is reversed the Court would hold as a matter of law that the Commission is not authorized to reduce the appellant's service area through electrical interference without a hearing. The court would force obedience to that rule of law. The Court would remand the case to the Commission to carry out the judgment of the Court, which is to say, with instructions that the Commission is not to grant the application involved without according appellant a hearing. The Commission would be bound to act upon the correction.

The Court of Appeals would lay bare the error and would compel obedience to its correction (*Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 145).

With the Court of Appeals having that power, it is necessarily concomitant that the Court should be able to preserve the power and keep it effective. If the allegations of the notice of appeal, which now stand admitted, are, in the discretion of the Court of Appeals, sufficient to impress that court that interlocutory preservation of the *status quo* is necessary to render effective the court's final order, there is no good reason why the power should not now be exercised. Otherwise the power of reversal conferred upon the court by Section 402(e) would be meaningless.

II. The legislative history of Section 402(b) indicates an intention that the Court of Appeals may enter stay orders.

(a) It had been the practice to issue such orders under an identical statute at the time 402(b) was enacted and this had been reported to Congress.

The radio appeals section of the Communications Act of 1934, Section 402(b), is copied from the act theretofore in effect and is substantially identical with Section 16 of the Radio Act of 1927 as it stood when it was superseded by the Communications Act. Prior to June 1, 1930, the appeals section was different, as it had provided an administrative or revisory supervision by the Court of Appeals in the same field (*Federal Radio Commission* v. *General Electric Company*, 281 U. S. 464; *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Company*, 289 U. S. 266).

In reenacting the appeals provision verbatim Congress must have intended that the courts should continue to understand the statute as they had done theretofore (*Helvering* v. *Wilshire Oil Company*, 308 U. S. 90, 99; *Heald* v. *District of Columbia*, 254 U. S. 20, 22-23).

Both under the Radio Act of 1927 and the Communications Act of 1934, the Court of Appeals "had consistently over a long period of years, and without objection on the part of the Commission, issued stay orders in cases in which such action was necessary in aid of (the) Court's appellate jurisdiction . . ." (R. 2).

It is to be observed that with the exception of the *Pottsville Case, supra*, every case coming to the United States Supreme Court, namely, the *General Electric Case, supra, Nelson Brothers Bond & Mortgage Company, supra, Fly* v. *Heitmeyer*, 309 U. S. 146, and *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, stay orders have been issued by the Court of Appeals.

In *Trinity Methodist Church, South* v. *Federal Radio Commission* (certiorari denied, 284 U. S. 685), the appellant petitioned this Court for a writ of certiorari addressed to the refusal by the Court of Appeals to issue a preliminary

stay order. In the brief for the Commission in opposition, power of the Court to issue such order was conceded and the brief addressed itself to other considerations (No. 559, October Term, 1931).

In the Third Annual Report of the Commission to Congress filed in November 1929, the Commission called to the attention of Congress the issuance of an order to stay execution of the Commission's decision in the *General Electric Case* (Report, p. 72).

In the Fourth Annual Report, filed in December 1930, the Commission reported to Congress a controversy then going on in the United States Court for the District of Connecticut as to the propriety of the issuance by the Court of Appeals of the District of Columbia of a stay order in a matter over which it does not have appellate jurisdiction and the question whether action of the Commission taken pursuant to stay orders issued by the Court of Appeals constituted a "revocation" of a station license (Report, p. 47).

The practice of the Court of Appeals to issue stay orders was so firmly established that Moncure Burke, Esq., former Clerk of the Court and author of Notes on Practice of the Court of Appeals of the District of Columbia, in the Supplement to the second edition of those Notes, published August 15, 1931, set up a form of petition for such stay order (page 11).

(b) The effort to prevent the issuance of such orders had been made and had failed and this was reported to Congress.

The question of the power of the Court of Appeals to issue a stay order was questioned by the Federal Radio Commission at the start of its administration of the Radio Act of 1927. In the Third Annual Report of the Commission to Congress, filed November 15, 1929, the Commission, in reporting on appeals then pending said:

> "A petition for 'stay order' has been filed in these cases, appellants relying on the decisions of the Court in

the WGY case (by which is meant the order of the Court granting a stay order in the *General Electric* case) and, which, if issued, as requested, would effectually prevent use of any of the channels pending final judgment by the court. Motions to dismiss these petitions have been filed by the commission on the theory that the Court of Appeals is without jurisdiction to issue such a writ." (Report, p. 77).

In reference to the WGY case the Commission said:

> "Preliminary to taking the appeal, station WGY had applied to the Court of Appeals for an order to stay execution of the Commission's decision, and this was granted."

In the cases referred to in the report the Commission's motion to dismiss petitions for stay orders was denied and the Commission did not thereafter question the Court's power until the present case. The present petition for stay was filed April 11, 1940. On February 23, 1939, the Commission filed in *Crosley Corporation* v. *Federal Communications Commission*, No. 7351 in the Court of Appeals a document entitled "Opposition to Petition for Stay Order" wherein it was stated by the Commission:

> "Now comes Federal Communications Commission, appellee herein, and in opposition to appellant's petition for stay order respectfully shows the court:
>
> "At the outset the Commission desires to make its position clear with respect to its Opposition to appellant's Petition for Stay Order. The Commission has not opposed in the past, and does not propose in the future to oppose the granting of a stay or such interlocutory restraining order by this court as may be necessary to protect the appellate jurisdiction of the court or preserve the *status quo* pending determination of an appeal from an order of the Commission, in any case where such a stay or restraining order appears reasonably to be necessary or advisable." (page 1)

(c) The provision for stay orders in Section 402(a) and the omission of specific provision in 402(b) is not indicative of an intention to prevent stay orders in radio cases; it is merely evidence of the conglomerate character of the statute.

The Communications Act of 1934 is a conglomerate, placing in the newly created Federal Communications Commission the powers which had theretofore been exercised by the Interstate Commerce Commission with reference to telegraph and telephone carriers, the powers which had theretofore been exercised by the Federal Radio Commission with regard to radio and certain powers of the Postmaster General under the Post Roads Act.

The appellate jurisdiction which had been provided in the case of decisions of the Federal Radio Commission was reenacted. There had been no appellate procedure as regarded actions of the Interstate Commerce Commission. Such actions had been reviewed under the provisions of an Act of October 22, 1913, 38 Stat. L. 219, relating to the enforcement or setting aside of orders of that Commission. That provision was also embodied into the Communications Act of 1934, as related to the regulation of the identical subject matter. Section 402(a) of the Communications Act made applicable the same procedure for orders of the new commission except as to those orders which were the subject of appeal under Section 402(b) in radio matters.

This makes it obvious that it was the intention of the Act that the methods of review theretofore obtaining with regard to the two classes of regulatory authority should continue. This makes no way for the argument that the description in 402(a) of a method for obtaining injunctive relief against common carrier regulation precludes the use of stay orders as a concomitant of appeals in radio regulation.

(d) The failure of Congress to reenact H. R. 7716 after the pocket veto is not indicative of an intention to prevent stay orders.

(i) The failure to reenact the statute is equivocal.

In the 71st Congress, Third Session (1931), Congress had under consideration H. R. 11635 to amend the Radio Act of 1927. Section 9 of the Senate bill struck out the appellate provisions of the Radio Act of 1927 and set up a more detailed procedure.

By paragraph (h) of that section, as passed by the Senate, it was provided:

> "The court may, . . . upon notice to the commission, and to all other parties to the appeal, after hearing, and for good cause shown, enter an order staying action of the commission under the order appealed from, in whole or in part, upon the giving of a bond by the party applying for the stay in such amount and with such terms and conditions as the court may deem proper. Pending a hearing upon the application for stay, the court may enter a temporary stay for a period of not to exceed fifteen days."

Senate Report No. 1578 which accompanied this bill stated:

> "Specific provision is made for stay orders upon the giving of a bond, with authority in the court to enter a temporary stay for a period not to exceed 15 days."

H. R. 11635 died in the conference committee. The provision relating to stay orders was carried over verbatim in section 10(f) of H. R. 7716, 72nd Congress. H. R. 7716 passed both Houses but did not become law because of pocket veto.

The provision concerning stay orders was but a part of a general recanvass of appellate procedure. The Court of Appeals was issuing stay orders as a regular practice. That Congress was familiar with this is indicated not only by the Commission's annual reports but also by the follow-

ing discussion of H. R. 7716 by the Chairman of the House Committee:

> "Mr. Linthicum. Should there not be some provision by which a station could give bond and then appeal, to determine this question (of suspension)? When they are once suspended that practically ruins the station forever. It seems to me if there was some provision by which they could give bond until they had a hearing upon the appeal, it would be better."
>
> "Mr. Davis (Chairman of the House Committee). *Well, they may now, under certain conditions*, but even after this bill is enacted they may, which however, is within the discretion of the court to which the case is appealed." 75 Cong. Rec. 3682 (1932). (Italics ours.)

The Senate Report (No. 1578) on H. R. 11635 said:

> "Specific provision is made for stay orders upon the giving of a bond, with authority in the court to enter a temporary stay for a period not to exceed 15 days."

The bill not having become law, the failure of Congress to reenact it can well be due to the abandonment of the desire to make *specific* provision for the stay and the requirement for bond and notice, thus permitting the Court to go on as it had previously, entering stay orders *ex parte* and without bond. The fact that the statute would have been *specific* authority for a practice then continuing under *general* law prevents this Congressional non-action from having interpretative significance.

(ii) H. R. 7716 must be considered against the background of General Broadcasting System v. Bridgeport Broadcasting Station, Inc., which shows the real reason for H. R. 7716 was a desire to provide for hearing and bond, not a desire to create authority for stay orders.

During 1930 and 1931 there were several efforts to revise and improve the appellate procedure under the Radio Act of 1927. Because of the decision of this Court in the *General Electric case, supra,* and the desire in Congress that

"radio law" receive authoritative pronouncement from this Court, the act was first amended by changing the character of review exercised by the Court of Appeals so as to make the power of that Court judicial instead of administrative.

Also, the appeal provisions were enlarged to permit appeals not only by persons whose applications were denied, but also by other persons, such as existing licensees who might be adversely affected by the grants of applications of others. (Act of July 1, 1930, 46 Stat. 844.)

It was in connection with this revision that the matter of a stay order was given Congressional study.

At that time there was pending in the Court of Appeals for the District of Columbia and in the United States Court for the District of Connecticut a controversy between General Broadcasting System, Inc., licensee of WGBS, New York, and Bridgeport Broadcasting Station, Inc., licensee of WICC, Bridgeport. (*General Broadcasting System, Inc.* v. *Federal Radio Commission*, 60 App. D. C. 64, *General Broadcasting System, Inc.*, v. *Bridgeport Broadcasting Station, Inc.*, *Bridgeport Broadcasting Station, Inc.* v. *Federal Radio Commission*, 53 F. (2d) 664). The Commission, on hearing three conflicting applications for the use of the 600-kilocycle frequency, then being used by WGBS, had awarded it to WICC. WGBS sued out an appeal in the District of Columbia and obtained a stay order. Prior to service of the stay order the Commission sent out the license. WGBS obtained an enlargement of the stay order to require the Commission to recall the license. WICC contended that this recall was a revocation of its license and undertook to appeal to the United States Court for the District of Connecticut, as was then authorized by the statute. Regarding the recall as illegal, WICC persisted in broadcasting at 600 kilocycles. In the United States Court for the District of Connecticut, WGBS brought an injunction suit to restrain operation by WICC. On this a temporary restraining order was entered after bond was given by WGBS. The Court of Appeals for the District of Co-

lumbia affirmed the decision of the Commission in February of 1931. This dissolved the stay order entered by the Court of Appeals. The question was then before the United States Court in Connecticut as to costs, bond, etc.

The District Court in August, 1931, held that the stay order theretofore issued by the Court of Appeals for the District of Columbia, having been granted prior to the effectiveness of the Act of July 1, 1930, was entered in an administrative proceeding where the court had no judicial functions. It said:

> "There is no question here as to the power of the Court of Appeals to issue a stay order or writ of supersedeas in the exercise of its judicial function. Instead, the question is whether said court in the performance of an administrative duty, cast upon it by the Radio Act has that power." P. 667.

It was held that the Court of Appeals did not have such power and that its stay order had been invalid. On rehearing, the Court held, on November 30, 1931, that the administrative Court of Appeals had not drawn on its judicial powers for the issuance of the stay order because no bond had been required. These questions had been before the Courts in 1930 and in 1931 and the question of bond was taken up in connection with the general revision of the appellate procedure.

Since no one had questioned the power of the Court of Appeals in its new judicial capacity to issue stay orders, and since such stay orders had been uniformly issued without hearing and without bond, it becomes apparent that the purpose behind the particular revision of H. R. 7716 was the purpose to bring stay orders against the Federal Radio Commission within the class of stay order on appeal where bond is required, and further to provide for a more orderly method of issuing such stay orders by requiring that requests therefor be set down for hearing or argument. Had there been any question of the court's power, it might then be possible to interpret H. R. 7716 as

undertaking to confer the power but all of the circumstances, both current and historical, run contrary.

III. The decision of this Court in the Pottsville case does not abolish the analogy of appellate-to-inferior court relationship, the decision merely cuts down the analogy to its proper proportion; it does not operate to deprive the appellate court of what is essentially an appellate jurisdiction; it leaves the Court with all statutory power to issue all necessary remedial writs in aid of its appellate jurisdiction, including the power to stay a decision of the Commission.

The organic act creating, and establishing the jurisdiction of, the Court of Appeals, provides that it "shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction" (Feb. 9, 1893, 27 Stat. 436, c. 74, sec. 11; Mar. 3, 1901, 31 Stat. 1227, c. 854, sec. 230).

Viewed as a Circuit Court of Appeals of the United States (e.g., *Federal Trade Commission* v. *Klesner*, 274 U. S. 145, 150-158), the Court has even wider powers, including those to issue all writs not specifically provided for by statute, which may be necessary for the exercise of . . . (its) jurisdiction(s), and agreeable to the usages and principles of law." (R. S. § 716; Mar. 3, 1911, c. 231, § 262, 36 Stat. 1162.)

Both these statutes gave character and authority to the Court of Appeals prior to the enactment of the Radio Act of 1927. That statute provided for review by *appeal* to the Court of Appeals for the District of Columbia. The word "appeal" was used in the amendment of July 1, 1930 and when the amended statute was carried over into the Communications Act of 1934, it was again used. "Appeal" is a word having a traditional and well-recognized significance. It is understood to invoke appellate powers and appellate jurisdiction. It must of necessity, therefore, invoke the power of court to issue remedial writs in aid of that jurisdiction. Even if the jurisdiction is not strictly appel-

late, the general statute applicable to all Circuit Courts of Appeals makes the remedial writs useable in aid of any jurisdiction. And this Court, in reliance on just such an all-writs statute, has itself stayed the effectiveness of an order of the Interstate Commerce Commission. (*Omaha & Council Bluffs Street Railway Company* v. *Interstate Commerce Commission*, 222 U. S. 582.)

It appears unlikely that the appellate power to suspend the order complained of would be questioned were it not for the decision of this Court in the *Pottsville* case, *supra*. There the Court of Appeals had undertaken to instruct the Commission in the manner of complying with the reversing order to the same extent that it would have instructed an inferior court under similar circumstances. It was held by this Court that the Court of Appeals had injected itself into the determination of nonjudicial matters properly within the administrative function of the Commission. It was held that the Court-Commission relationship was not so closely analogous to the superior-inferior court relationship as to permit this intrusion. The distinction was made between the performance of the power over interstate commerce by the Commission and the performance of constitutional judicial powers by the Court (p. 141). The difference was pointed up by reference to differences in practice between courts and commissions (p. 143). But the essential function of the court in the correction of errors of law and in compelling the Commission on remand to act in accordance with law was reaffirmed in the *Pottsville* case (p. 145).

It is to be observed that what is sought by the present appeal is a ruling by the Court of Appeals that as a matter of law the Commission is without power to circumscribe the service of appellant during its license period without a hearing. No request is or can be made of the Court for instruction to the Commission as to the time, place, circumstances or manner of hearing, and no intervention by the Court in the administrative process of the Commission is sought. Surely in these circumstances the *Pottsville* case

cannot be read to terminate the appellate function of the Court entirely, to deprive it of the power to lay bare errors of law or to compel obedience to the correct rule of law. To read the *Pottsville* case as so utterly depriving the Court of Appeals of its appellate characteristics in relation to the Commission is to interpret that decision as effectively depriving the appellate remedy of significance.

IV. Even if the appellate court analogy be entirely destroyed, the appeal to the Court of Appeals from a decision of the Federal Communications Commission must be regarded as an original suit in equity with all power in the court to issue interlocutory decrees for the protection of the appellant's property.

The Court of Appeals is a constitutional court, created under authority of Article 3, Section 1 of the Constitution. It functions in a judicial capacity and an appeal from the Commission to the Court is a case or controversy within the meaning of the Constitution. Whatever be its name, some cause of action, some adjudication of rights is taking place when an appeal is taken.

While it is true that the licensee of a radiobroadcasting station has no property rights whatsoever as against the properly exercised regulatory power of the Federal Government, it is nevertheless true, as persuasively shown by the opinion of Mr. Justice Miller below (R. 11 to 13), that the appellant is taking into the Court of Appeals for adjudication some rights which are justiciable. During the term of a radiobroadcasting license, a licensee may not be disturbed in the exercise of his license, except in accordance with the procedure provided for by law and he may challenge any action of the Commission or of any private person which infringes upon the rights conferred by his license. When the license has expired the applicant has no property right to a renewal thereof, but while the license is in effect the licensee may not be disturbed except by lawful regulation or by the revocation procedure provided for in

the statute. Should there be any action by the Commission in granting a license to another person which impinges upon the rights of the existing licensee which are recognized by statute, that licensee may appeal. (*Journal Company* v. *Federal Radio Commission*, 60 App. D. C. 92.) If the analogy of ordinary appellate procedure is not applicable, then the appeal is in effect an original suit, whereby the appellant seeks to have the Court of Appeals prevent the Commission from unlawfully trespassing upon the appellant's rights. Under such an aproach the applicable analogy is to a suit to restrain the enforcement of an invalid administrative order.

As was said by this Court in *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Company, supra*, at page 277:

> "If the questions of law thus presented were brought before the Court by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceeding. But that character is not altered by the mere fact that remedy is afforded by appeal. The controlling question is whether the function to be exercised by the Court is a judicial function, and, if so, it may be exercised on an authorized appeal from the decision of an administrative body. We must not 'be misled by a name, but look to the substance and intent of the proceedings.'"

So regarded there should be no question that the all-writs clause confers upon the Court of Appeals as a Circuit Court of Appeals the power to preserve the *status quo*.

And this is an important power in the preservation from electrical interference of an existing radio service, lest through arbitrary action without appellate relief the regulatory body could restore to the field of radiobroadcasting the chaotic interference conditions which allegedly prevailed prior to 1927 and which led to the necessity for a regulatory body.

V. In general, in dealing with appellate stay of administrative orders, Congress has not specifically provided for such stays but has relied on the general power of the Courts to authorize stays; mostly, legislative reference to stay orders has assumed the Courts' power and has gone on to restrict its exercise.

After the testing out of the method of appeal provided for in connection with radio cases, Congress over the years has created similar appellate remedies for a number of other similar administrative tribunals. In all but one of these instances reliance was had upon the general powers of Circuit Courts of Appeal to issue stay orders and no specific authority for the issuance of such stay orders was enacted. The Congressional solicitude was only that the stay orders should not be entered automatically but should be entered only on specific order of the Court.

In 1933 there was established an appellate procedure covering decisions of the Securities and Exchange Commission. It is provided by 15 U. S. C. 77 i, that any person aggrieved by an order of the Commission may obtain a review of such order in the Circuit Court of Appeals of the United States. It is also provided: "(b) the commencement of proceedings under subsection (a) is not, unless specifically ordered by the Court, to operate as a stay of the Commission's order".

In connection with the Federal Power Commission, it was provided in 1938 that any party to the proceeding relating to natural-gas companies could obtain review in Circuit Courts of Appeal of the United States, and that the commencement of such proceedings should not, unless specifically ordered by the court, operate as a stay of the Commission's order, 15 U. S. C. 77 r. The same provision is made in 15 U. S. C. 836 (b) in reference to the National Bituminous Coal Commission, in 16 U. S. C. 825 l (c), in reference to conservation powers of the Federal Power Commission and in 29 U. S. C. 160 (f) (g) in respect to the National Labor Relations Board. As regards the Fed-

eral Alcohol Administration Act, 27 U. S. C. 204 (h), the provision is that the commencement of proceedings shall, unless specifically ordered by the court to the contrary, operate as a stay of the administrator's order. As regards the Civil Aeronautics Authority, specific provision is made for stay by 49 U. S. C. 646: "Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or such other relief as may be appropriate."

That the action of the Alcohol Administrator is automatically stayed unless ordered otherwise and that specific authority for stay is given in connection with aeronautical regulation does not alter the fact that in all the other statutes the legislation is limiting in effect. If the all-writs clause is insufficient to permit the exercise of the court's jurisdiction in granting stays no additional authority is conferred by the statutes cited and the limiting language that the appeal will not operate as a stay unless so ordered would be meaningless. Surely these statutes are continued recognition by Congress of the applicability of the general jurisdiction of the court to grant interlocutory stays.

CONCLUSION.

This case concerns relationship between courts and administrative agencies. As Mr. Chief Justice Stone has stated:

> ". . . in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action." *United States* v. *Morgan*, 307 U. S. 183, 191 (1939).

The basic issue is whether the courts have been endowed with sufficient statutory authority to act as an instrumentality of justice "in securing the plainly indicated objects of the statute." If the lower court lacks the power to maintain the *status quo* pending an appeal, then its judicial functions are impaired to the extent that the judgment of the court may not be effectuated. The subject matter of the appeal may be gone. This might nullify the provisions for review and prohibit the court from carrying out the duties defined by the words of the statute—"to carry out the judgment of the court." The "all-writs" clause must of necessity be part of the appellate jurisdiction of the courts; to read it out of the statute would endanger judicial review.

The issuance of the stay order will not result in an unwarranted interference with the administrative process. The objective sought by the stay is the same objective sought by the reversal on the merits except for the necessary difference betwen a final and interlocutory order.

The question certified by the court below should be answered in the affirmative.

Respectfully submitted,

PAUL M. SEGAL,
HARRY P. WARNER,
1026 Woodward Building,
Washington, D. C.,
Attorneys for the Appellant.

GEORGE S. SMITH,
Of Counsel.

ACKNOWLEDGMENT OF SERVICE

Receipt is acknowledged of a copy of the foregoing brief.

FEDERAL COMMUNICATIONS COMMISSION

By .....
TELFORD TAYLOR,
General Counsel.

January 20, 1942.

APPENDIX.

Section 402, Communications Act of 1934.

SEC. 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license), and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter

permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application involved, and also a like copy of its decision thereon, and shall within thirty days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however*, That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, and/or other interested parties intervening in said appeal, but not against

the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

Section 262, Judicial Code.

§ 377. "*Power to issue writs.* The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. (R. S. § 716; Mar. 3, 1911, c. 231, § 262, 36 Stat. 1162.)"

Section 230, District of Columbia Code.

"*Writs.* The said court of appeals shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction. (31 Stat. 1227, c. 854, Sec. 230.)"

Section 405, Communications Act of 1934.

SEC. 405. After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: *Provided, however,* That in the case of a decision, order, or requirement made under Title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted, the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those

arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination, shall be subject to the same provisions as an original order.

Section 1.271, Rules and Regulations, Federal Communications Commissions.

"*Petitions; contents.* Any party whose interests are aggrieved or adversely affected by any decision, order, or requirement of the Commission may file a petition for rehearing of the same or any matter determined therein as provided in section 405 of the act. Such petition for rehearing may request (1) reconsideration, either in cases decided after hearing or in cases of applications granted without hearing under title III of the act; (2) reargument; (3) reopening of the proceeding; (4) amendment of any finding, or (5) other relief. Such petition shall be specific as to the form of relief sought and, subject to this requirement, may contain alternative requests. Each such petition shall state with particularity in what respect the decision, order, or requirement or any matter determined therein is claimed to be unjust, unwarranted, or erroneous, and with respect to any findings of fact must specify the pages of record relied on. Where the existence of newly discovered evidence is claimed, the petition must be accompanied by a verified statement of the facts, together with the facts relied on to show that the petitioner, with due diligence, could not have known or discovered such facts at the time of the hearing."